
U.S. Department of Labor

Case No. 82-ERA-2

In the Matter of

DEAN DARTEY,
Complainant

vs.

ZACK COMPANY OF CHICAGO
(MIDLAND NUCLEAR POWER PLANT,
MIDLAND MICHIGAN),
Employer

DECISION DENYING MOTION TO DISMISS

This is a proceeding under Section 5851 of the Energy Reorganization Act (42 U.S.C. § 5851) seeking a remedy for alleged discrimination against an employee purportedly resulting from his assisting or participating in enforcement of provisions of said Act. Employer moves to dismiss the proceeding on the grounds that the complaint was not served within thirty (30) days after the alleged act of discrimination and that the Secretary of Labor did not issue an order thereon within ninety (90) days of the receipt of such complaint.

The facts set forth below appear from the papers submitted on this motion.

In January, 1980, Complainant was employed as a Quality Control Inspector of the heating ventilation and air conditioning systems being installed by Employer at the Midland Nuclear Plant in Midland, Michigan. Upon observing what he perceived to be defective work violative of the Act, he reported such deficiency to his supervisor and thereafter to the Nuclear Regulatory Commission (NRC). On or about February 20, and March 12, 1980, Complainant met with representatives of the NRC and reported the alleged violation. On or about March 17, 1980, Complainant was questioned by officials of the Employer as to whether or not he had made a complaint to the NRC.

On March 19, 1980, Complainant was suspended for thirty days without pay for allegedly taking company documents off the premises. On April 20, 1980, Complainant was discharged.

On March 20, 1980, the day following his suspension, Complainant orally reported such suspension to representatives of NRC and was referred to the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA). Upon Complainant's telephone call to the Baltimore Operations Review Office of OSHA, a written memorandum of his discrimination complaint was filed on OSHA Form 82, stating as his allegation that "Dartey was falsely accused of attempting to take documents off the worksite and suspended as he had filed a complaint resulting in a NRC inspection", and certifying that the complaint was filed on March 20, 1980. Under date of April 7, 1980, Employer was notified in writing by OSHA that a complaint had been filed by Complainant" alleging a violation of Section 11(c) of the Occupational Safety and Health Act, Public Law 91-596", the allegation being "that he was given work suspension(s) as a result of making safety complaints to the Nuclear Safety [sic] Commission."

On August 13, 1981, Complainant submitted a written confirmation of his complaint to the U.S. Department of Labor's Wage and Hour Division in Grand Rapids. Under date of September 11, 1981, the Wage and Hour Division notified the Employer of Complainant's complaint alleging discriminatory employment practices in violation of the Energy Reorganization Act, stating: "This charge was received by our office on August 24, 1981". On November 10, 1981, the Wage and Hour Division notified Employer that it had been found to have suspended, and subsequently

---

terminated, Complainant in violation of the Act. That notice stated, *inter alia*: "As you know Dean Dartey filed a complaint with the Secretary of Labor under the Energy Reorganization Act on 3/20/80 and 8/24/81."

On or about April 20, 1981, the Manager of Quality Control at Employer's Midland facility resigned and has not since been employed by Employer.

Upon the foregoing facts, which are uncontroverted for purposes of this motion, neither of Employer's contentions can prevail. Pertinent provisions of Section 5851 of the Energy Reorganization Act are as follows:

> **§ 5851. Employee protection**
>
> **Discrimination against employee**
>
> (a) No employee, including a Commission licensee, an applicant for a Commission license, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of

employment because the employee (or any person acting pursuant to a request of the employee)-

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1964, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(2) testified or is about to testify in any such proceeding or;

(3) assisted or participated or in about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

Complaint, filling and notification

(b) (1) Any employee who believes that he has been discharged or

---

otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint and the Commission.

(2) (A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

The purpose of this and other employee protection or "whistle-blower" statutes is to encourage enforcement of laws designed to safeguard the health and welfare of the community as well as the individuals directly involved. The objective is to eliminate the fear of employer retaliation, so that employees may freely report apparent violations with a view to vigilant policing and salutary enforcement of the law *pro bono publico*. Consequently, in setting very short time limitations, the primary intention was not to prevent the prosecution of stale claims, but rather to provide a quick and efficacious

remedy for an employee who may have been wrongfully thrown out of a job. The statute must be construed accordingly.

In the first place, it has not been shown that there has been any violation of the precise terms of the statute insofar as the filing of a complaint is concerned. Bearing in mind that OSHA is not an independent government agency, but is a component part of the Department of Labor, there was literal compliance with paragraph (b)(1) of Section 5851

---

mandating that within thirty days after such violation occurs, one may "file ... a complaint with the Secretary of Labor".

True, Departmental regulations (29 CFR § 24.3) require that the complaint *must* be in writing and *may* be filed in person or by mail with the Office of the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The OSHA memorandum of the discrimination complaint on March 20, 1980, however, constitutes compliance with the regulatory requirement of a writing, since it has been expressly held that where a claim must be filed in writing, a written memorandum filed by or for the recipient of a telephone call is sufficient. *Firemen's Fund Insurance Co. v. Bergeron*, 493 F.2d 545 (5th Cir. 1974). The provision in the regulation for filing with the Wage and Hour Division is clearly directory only, not mandatory. Under the circumstances, a filing in the wrong office of the right Department is not fatal, and the regulatory limitation is tolled. See *Morgan v. Washington Manufacturing Co.*, 660 F.2d 710 (6th Cir. 1981).

It cannot be disputed that the ninety-day provision for disposition of the claim was not complied with by the Secretary or the Department of Labor. Mindful, however, of the prime purposes referred to above, the Employer can hardly be regarded as a party aggrieved by such noncompliance. The expedited procedure is designed to minimize the hardship that might result to the employee, not to provide a technical "out" for the employer.

The papers in support of the motion are notable for their ringing rhetoric (*e.g.*, "The expansiveness of this argument is breathtaking.") and mixed metaphors (*e.g.*, "the scenario painted by Complainant"), but the vital substantive question of due notice is dealt with only in terms of the incorrect statutory reference. The fact is that on or about April 7, 1980, the Employer was fully apprised of the nature of Complainant's charge that he had been discriminated against because he had "blown the whistle" on Employer by reporting to governmental authorities. Section 11(c) of the Occupational Safety and Health Act, Public Law 91-596 [29 U.S.C. § 5660(c)], referred to by OSHA, is for all practical purposes much the same in content as Section 5851. Consequently, Employer was aware that Complainant had called the attention of the NRC to

---

the alleged deficiencies, and it knew within thirty days of his suspension that he had complained to the Department of Labor of the purported discriminatory action by reason thereof. Employer knew then what it had to contend with, and it is not unreasonable to infer from the careful language of its discharge telegram on April 20, 1980, that its defense had begun to take shape.

Resort to the resignation of the Quality Control Manager, a material witness, as a basis of prejudice resulting from the delay, appears to be sham. In a vain attempt to create the impression that managers who resign their posts vanish into thin air like migrant farm workers after the crop is harvested, Employer submits an artfully worded affidavit of its president to the effect that she has not talked or otherwise been in communication with the manager and has "no direct knowledge of his present employment (if any) or whereabouts." She adds gratuitously that she has no knowledge of whether he would be released by his present employer (if any) for the purpose of testifying. Conspicuous by its absence, however, is any reference to his last known address, or the place where his W-2 Forms are sent, or what efforts (if any) have been made to locate him. No showing has been made that he is no longer available.

The motion to dismiss is in all respects denied. Accordingly, the stay of proceedings contained in the Order to Show Cause dated December 14, 1981, has now expired. Notice of a rescheduled hearing will issue in due course.

Dated at Washington, D.C. this 29th day of January, 1982.

ROBERT J. FELDMAN
Administrative Law Judge

RJF/mml